STATE OF MICHIGAN

COURT OF APPEALS

TEMPS BY ANN, INC., d/b/a ALL STAR TEMPORARIES, INC.,

Plaintiff/Counter-Defendant-Appellee,

v

CITY STAR SERVICES, INC., d/b/a COMMERCIAL WASTE DISPOSAL, INC., d/b/a TRI-CITY DISPOSAL SERVICE, MICHIANA RECYCLING AND DISPOSAL COMPANY, TOWN AND COUNTRY DISPOSAL, INC., and TRI-COUNTY LIQUID WASTE, INC., d/b/a ENVIRONMENTAL SERVICES,

Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
March 17, 2000

No. 206025
Kalamazoo Circuit Court
LC No. 94-003002-CK

TEMPS BY ANN, INC., d/b/a ALL STAR TEMPORARIES, INC.,

Plaintiff/Counter-Defendant-Appellee,

v

CITY STAR SERVICES, INC., d/b/a COMMERCIAL WASTE DISPOSAL, INC., d/b/a TRI-CITY DISPOSAL SERVICE, MICHIANA RECYCLING AND DISPOSAL COMPANY, TOWN AND COUNTRY DISPOSAL, INC., and TRI-COUNTY LIQUID WASTE, INC., d/b/a ENVIRONMENTAL SERVICES,

Defendants/Counter-Plaintiffs-Appellants.

No. 210387
Kalamazoo Circuit Court
LC No. 94-003002-CK

Before: Hood, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

In these consolidated cases stemming from a breach of contract cause of action, defendants appeal as of right in Docket No. 206025 from a judgment entered in favor of plaintiff following a jury trial. Defendants' motion for judgment notwithstanding the verdict (JNOV), new trial, or remittitur was denied. In Docket No. 210387, defendants appeal by leave granted the trial court's decision to award plaintiff attorney fees and costs under MCR 2.405. We affirm.

I. Background Facts

Plaintiff supplies temporary employees to companies under an arrangement whereby the companies pay plaintiff an agreed-upon rate and, in return, plaintiff assumes responsibility for paying the employees' actual wages, as well as employer-related payroll taxes, and benefits and insurance, including workers' compensation insurance. Plaintiff supplied temporary employees to each of the defendants and commenced this breach of contract action after defendants refused to pay for the leased employees.

Plaintiff claimed that the parties' arrangement was governed by an oral contract. Conversely, defendants claimed that their arrangement was governed by a written contract, the terms of which were set forth in the following letter, dated November 22, 1993, written by plaintiff's owner, Ann Bouchelle:

> On behalf of All Star I would like to thank you for the opportunity to bid the payroll project for your company. . . .
>
> All Star will be able to write the payroll we discussed at our meeting, which includes drivers, garbage collectors, and recyclers, at a markup of 41%.
>
> I hope this price . . . is satisfactory to you.
>
> There is no question in my mind that the service you will receive through All Star will be of the utmost quality. This service will also have a positive effect on your bottom line in the long run.
>
> Again, thank you for the opportunity.
>
> Should there be any questions, don't hesitate to call.

Shortly after the business relationship commenced, plaintiff was informed by its workers' compensation insurance carrier that the employees supplied to defendants had been misclassified and, because of the nature of the work, the cost of workers' compensation protection would increase. Plaintiff subsequently informed defendants that, as a result of the reclassification, the rate charged to

them would likewise increase. Plaintiff informed defendants that it would charge them the old rate for two weeks to give them time to decide whether they wanted the services continued under the increased rate. Defendants did not cancel the services and continued to use the employees for several months. However, defendants did not pay any of the invoices that contained the higher percentage rate.

As a result, plaintiff terminated the business relationship and commenced this lawsuit. Plaintiff's offers of judgment were rejected by all four defendants. Following trial, the jury found for plaintiff against defendants, and awarded damages in the following amounts: (1) $42,521.12 against defendant City Star Services, (2) $10,928.15 against defendant Tri-County Liquid Waste, (3) $21,988.32 against Michiana Recycling and Disposal, and (4) $13,945.90 against defendant Town and Country Disposal.

II. Docket No. 206025

A

Defendants first argue that of the trial court abused its discretion in denying their motion for JNOV, new trial, or remittitur, contending that the verdict was against the great weight of the evidence. We review a trial court's decision regarding a motion for either JNOV, new trial, or remittitur for an abuse of discretion. *Abke v Vandenberg*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 206617, issued 1/11/00), slip op at 2; *Carpenter v Consumers Power Co*, 230 Mich App 547, 554; 584 NW2d 375 (1998); *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997).

> A motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. If the evidence is such that reasonable minds could differ, the question is for the jury and JNOV is improper. [*Pontiac School District v Miller, Canfield, Paddock, Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997).]

"A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that a serious miscarriage of justice would result from allowing the verdict to stand." *In re Ayres*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 216523, issued 12/7/99), slip op at 8. "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility" for that of the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

Defendants assert that the trial court erred because the great weight of the evidence established that plaintiff committed the first substantial breach of the contract between them by not paying for workers' compensation insurance coverage during the initial period of the agreement. We disagree. The jury expressly found that plaintiff did not substantially breach its contract with the parties. Our review of the record convinces us that this determination is not against the great weight of the evidence. Plaintiff's insurance agent testified that even though plaintiff was requested to obtain a different policy to

cover the higher risk of defendants' employees, the new policy was "written back" to cover the total period in question and plaintiff was never without workers' compensation insurance coverage. This testimony was corroborated by the testimony of plaintiff's principal owner and also plaintiff's controller. Deferring to the jury's superior ability to assess witness credibility, we conclude that the trial court did not err in denying defendants' motion for JNOV, new trial, or remittitur on this basis. Accordingly, defendants' related argument that the evidence established that plaintiff had been unjustly enriched by failing to pay for the workers' compensation insurance is without merit.

We also reject defendants' argument that their motion for JNOV, new trial, or remittitur, should have been granted given an irregularity that occurred in the trial court proceedings. The irregularity complained of occurred when the jury, after having determined that plaintiff was due service charges from the four defendants, indicated on the verdict form a percentage due, as opposed to a dollar amount. We believe that the fact that the court instructed the jury to revisit the issue and provide the court with a sum certain did not seriously compromise the jury's free exercise of its judgment. *Dayhuff v General Motors Corp*, 103 Mich App 177, 191; 303 NW2d 179 (1981). The court advised the jury that its decision must be based solely on the evidence, and that nothing the court had said should be construed as an indication on how the matter should be resolved. Moreover, defendants have failed to demonstrate that their substantial rights were materially affected, or that they were actually prejudiced by the redeliberation. MCR 2.611(A)(1)(a); *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 547; 481 NW2d 762 (1992).

Finally, we reject defendants' argument that the great weight of the evidence established that they did not agree to pay the service charge for the overdue bills specified in each invoice sent to defendants. After reviewing the evidence, and deferring to the jury's superior opportunity to assess witness credibility, we conclude that ample evidence was presented to support the jury's conclusion that defendants were obligated to pay the service charge. Accordingly, we also conclude that the trial court did not err when it denied defendants' motion for directed verdict on plaintiff's claim for service charges. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 406; 571 NW2d 530 (1997).

B

Next, defendants claim that the trial court erred as a matter of law by effectively awarding plaintiff double interest when it authorized the jury to award service charges up to the date of the verdict, and then added statutory interest pursuant to MCL 600.6013(6); MSA 27A.6013. We disagree. The jury concluded that defendants were liable for the amount owed on the unpaid invoices, as well as for the service charge plaintiff imposed on late payments. Defendants' attempt to equate the service charges with interest on the money judgment is without merit. The service charge was a part of the damages awarded, not "interest" on the money judgment. MCL 600.6013(6); MSA 27A.6013(6) provides that interest shall be imposed on the entire amount of the money judgment, including attorney fees and other costs. Accordingly, there was no duplication of interest.

C

Next, defendants argue that the trial court erred in granting plaintiff's motion for directed verdict on defendants' counterclaim alleging a violation of the Michigan Consumer Protection Act (MCPA).[1] We disagree. "The MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." *Zine v Chrysler Corp*, 236 Mich App 261, 270-271; 600 NW2d 384 (1999). Because defendants purchased the services of plaintiff's employees for a business or commercial purpose as opposed to a personal purpose, MCL 445.902(d); MSA 19.418(2)(d), the trial correctly concluded that the MCPA did not apply. *Zine, supra* at 273.

D

Defendants next argue that the trial court abused its discretion when it allowed plaintiff's counsel to "testify" about his wife's business dealings with plaintiff. Again, we disagree. During cross-examination of Henry Valkema, president of all four defendant corporations, plaintiff's counsel indicated, in a question posed, that counsel's wife owned a business that was one of defendants' customers. We do not believe this brief reference by plaintiff's counsel reflects a deliberate course of conduct aimed at preventing a fair and impartial trial. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). Moreover, the trial court did not abuse its discretion when it permitted plaintiff to inquire of defendants' own business practices with regard to service charges. The evidence was relevant to demonstrate whether defendants were familiar with similar service charge provisions, and their implications and obligations. MRE 401; *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

E

Defendant further claims the trial court abused its discretion when it refused to admit plaintiff's amended complaint into evidence. We disagree. Contrary to defendants' argument, the amended complaint would not rebut plaintiff's testimony concerning the existence of a contract between the parties. After reviewing the relevant portion of Bouchelle's testimony, we believe the trial court correctly concluded that Bouchelle had not denied the existence of a contract between the parties. Rather, Bouchelle's testimony went to the effect that should be given to the November 22, 1993 letter. Indeed, although they disagreed as to the nature and substance of the agreement, both parties stipulated that a contract existed between them. Accordingly, the trial court did not abuse its discretion when it denied defendants' attempt to introduce the document into evidence on the ground that it would have been cumulative, would have led to confusion of the issues, and would have been a waste of the court's and the jury's time. MRE 403.[2]

F

Finally, we reject defendants' assertion that the trial court erred in denying defendants' untimely request to admit certain workers' compensation records into evidence. The document in question was in defendants' custody and should have been produced during discovery or introduced during

defendants' direct examination. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

III. Docket No. 210387

A

In Docket No. 210387, defendants challenge the trial court's post-trial decision to award plaintiff costs and attorney fees. Defendants first argue that, because it had already filed its claim of appeal in Docket No. 206025, the trial court lacked jurisdiction to award costs and attorney fees. We disagree. Whether the trial court had subject matter jurisdiction is a question of law which we review de novo. *Brewer v Oaks*, 218 Mich App 392, 395; 554 NW2d 345 (1996).

Once a claim of appeal is filed, the trial court may not amend or set aside the judgment or order appealed from except pursuant to an order of this Court, by a stipulation of the parties, or as otherwise provided by law. MCR 7.208(A); *Co-Jo, Inc v Strand*, 226 Mich App 108, 118-119; 572 NW2d 251 (1997). This Court has applied this rule to prohibit a trial court from granting a party attorney fees or costs after a claim of appeal is filed, unless the order or judgment expresses an intention to grant such costs. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 314; 486 NW2d 351 (1992). Here, the judgment appealed from expressly stated that "[p]laintiff may recover its costs of this action pursuant to Court rule." This language was sufficient to allow the court to retain jurisdiction to consider an award of costs and attorney fees.

B

Defendants' also argue that the trial court erred in calculating the adjusted verdict pursuant to MCR 2.405. Defendants' argument is premised on their earlier assertion that the court effectively awarded plaintiff double interest when it authorized the jury to award service charges and then added statutory interest pursuant to MCL 600.6013(6); MSA 27A.6013. Having already rejected the underlying premise, we conclude that defendants' argument is without merit.

C

Finally, we also reject defendants' challenges to the award of sanctions under MCR 2.405. Defendants argue that because plaintiff's offer of judgment to defendant City Star Services was not for a sum certain, the award of sanctions based on that offer was erroneous. Defendants assert that the offer was not for a sum certain because it contained the following concluding statement: "This offer may not be accepted in part." We do not believe that this language invalidates the offer. *Central Cartage Co v Fewless*, 232 Mich App 517, 531-533; 591 NW2d 422 (1998). Indeed, by clearly indicating that portions of the offer could not be accepted piecemeal, the provision actually bolsters the fixed nature of the offer.

As for the "interest of justice" exception found in MCR 2.405(D)(3),[3] this Court observed in *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995), that the "interest of justice" provision "is not the equivalent of a legal Rorschach test on to which each jurist

may project his or her individualized notion of justice." Defendants have failed to establish that "unusual circumstances" exist that would justify the denial of attorney fees under

MCR 2.405. *Luidens v 63rd Dist Court*, 219 Mich App 24, 33; 555 NW2d 709 (1996); *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 339; 525 NW2d 470 (1994).

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*

[2] Additionally, we note that defendants were not prejudiced by the court's refusal to admit the complaint into evidence, given that defendants were permitted to refer to the complaint during cross-examination.

[3] MCR 2.405(D)(3) states in pertinent part: "The court may, in the interest of justice, refuse to award an attorney fee under this rule."